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IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1964

No. 530

MARY H. SHELP and GENEVIEVE M. McKINNEY,
Petitioners,

versus

NATIONAL SURETY CORPORATION,
Respondent,

Petition for Writ of Certiorari
To the United States Court of Appeals for the
Fifth Circuit

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IN THE

UNITED STATES SUPREME COURT

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No. .....

MARY H. SHELP and GENEVIEVE M. McKINNEY,
Petitioners,

versus

NATIONAL SURETY CORPORATION,
Respondent,

Petition for Writ of Certiorari
To the United States Court of Appeals for the Fifth Circuit

Mary H. Shelp and Genevieve M. Mc Kinney, your petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled case on June 26, 1964.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit entered June 26, 1964 (App. A. infra. p. 11) is reported at 333 F.2d 431.

The opinion of the District Court for the Eastern District of Louisiana granting motion for summary judgment entered March 27, 1963 (R. 32) is reported at 218 F. Supp. 615.

JURISDICTION

Tne judgment of the Court of Appeals for the Fifth Circuit was entered on June 26, 1964 (App. A. Infra. p. 27). Jurisdiction of the Court is invoked under 28 U.S. Code 1254(1).

QUESTIONS PRESENTED

A.

In a diversity action, is a federal appellate court at liberty to interpret the law of the forum state in such manner as to: (1) violate the express provisions of the state's codified law; (2) ignore the state's appellate jurisprudence; and (3) overrule a decision of the Supreme Court of the United States?

B.

In a diversity action, is a federal court at liberty to apply a rule of statutory construction which inserts words in a foreign language and thereby renders the forum state's law unconstitutionally vague?

STATUTES INVOLVED

Appendix B contains a full text of the following statutory provisions referred to in this petition:

Constitution:

United States Constitution:
Amendment XIV

Louisiana Constitution of 1921:
Art 7, Sec. 11, and Art. 1, Sec. 2

Louisiana Civil Code (1870):
Art. 2322, Art. 2716, Art. 13, and Art. 7

Louisiana Civil Code (1825) (French), Art. 2686

STATEMENT OF THE CASE

Both petitioners were brutually assaulted and beaten and one raped by an intruder when a defective exterior entrance door in an aparment house leased from respondent's assured collapsed, allowing access to the dwelling. (R. 32) Liability is predicated on Louisiana Civil Code (1870) Article 2322. (App. B p. 30).

Respondent, the liability insurer of the owner and lessor of the premises, moved for summary judgment (R. 8) on the ground that Louisiana Civil Code (1870) Article 2716 (App. B pp. 30, 31) absolves the owner-lessor from liability for injuries proximately caused by a defective "door," notwithstanding the fact that the word "door" is conspicouusly omitted from this Code Article.

The District Court granted respondent's motion and dismissed petitioner's suit. The Court of Appeals for the Fifth Circuit affirmed the judgment of the lower Court on June 26, 1964.

For reasons hereinafter set forth, petitioners respectfully apply for a writ of certiorari to review the judgment and the opinion below so that petitioners' cause of action for damages may be reinstated and remanded for a trial on the merits.

REASONS FOR GRANTING THE WRIT

The Louisiana Civil Code of 1825 was enacted both in French and in English. The English text was a translation from the French. *U.S. v. Harang*, 165 F.2d 106. Cert. den. 334 U.S. 811; 6 Tul. L. Rev. 280. The Code of 1825, however, was revised in 1870, and a new Code was adopted. Id. The Louisiana Civil Code of 1870, which is presently in force, was enacted only in English. Id. The Court of Appeals for the Fifth Circuit in the present case held that proper codal interpretation based on Civil law technique required the insertion of a word contained in the French text of Article 2686 of the Civil Code of 1825 (App. B. p. 31) into Article 2716 of the Civil Code of 1870 even though this word was omitted from the English text of Article 2686 of the Code of 1825 as well as the Civil Code of 1870. The effective result is to make the French text ultimately authoritative.

To accomplish this result, the Court of Appeals has (1) violated the express rules of construction contained in the Code, (2) ignored a square holding by an intermediate

Louisiana Appellate Court, and (3) expressly overruled a decision of this Court:

ARGUMENT

Article 2716 of the Louisiana Revised Civil Code of 1870 reads, in relevant part, as follows:

> "The repairs, which must be made at the expense of the tenant, are those which, during the lease, it becomes necessary to make: . . . To windows, shutters, partitions, shop windows, lock and hinges, and everything of that kind, according to the custom of the place."

The Court of Appeals, however, has re-written this solemn expression of Louisiana's legislative will to read, in relevant part, as follows:

> "The repairs, which must be made at the expense of the tenant, are those which, during the lease, it becomes necessary to make: . . . To *doors*, windows, shutters, partitions, shop windows, locks and hinges, and everything of that kind, according to custom of the place."

Such revision, especially in an "Erie" situtaion is, we submit, erroneous for the following reasons:

(1)

THE CODE'S OWN RULES OF STATUTORY CONSTRUCTION PROSCRIBE THE CONSTRUCTION GIVEN BELOW

The Louisiana Civil Code, doctrinally the whole body of the State's private law, contains its own rules for statu-

tory construction which the Court of Appeals disregarded. Article 13 provides:

> "When a law is clear and free from all ambiguity, the letter of it is not to be disregarded, under the pretext of pursuing its spirit."

Petitioners submit that this Code Article prevents any judicial construction of Civil Code Article 2716 other than as written. Certainly, it does not permit the insertion of words; or as stated in *Jackson v. Coxe*, 208 La. 715, 23 So. 2d 312, by the Louisiana Supreme Court:

> "The Court is powerless to change the wording of the law, that being a matter for legislative consideration."

The necessity for adherence to the self-contained rules was recognized in *Viterbo v. Friedlander, 120* U.S. 707.

This holding produces an unfortunate situation. The principle that knowledge of the law is presumed in all cases is legislatively recognized in Civil Code Article 7 (1870) (App. B. p. 31); but the import of the decision below is to require that all persons subject to the operation of Louisiana law, know and conform to a superseded compilation of laws written in a foreign language.

A maxim may be valid in Latin, but not so a statute: *Ignorantia juris quod quisque teneture scire, neminem excusat.* Onerous though it may be, that ignorance of the law is no excuse, a system of law would defeat itself without such a rule. It means, of course, that every American citizen is presumed to know the law. Implicit in the rule

is the corollary that the presumption applies to laws understandably promulgated in the language of our country. How unbearable the burden, how wide the havoc wrought, if the legal fiction is converted into fantasty by extending it to foreign tongues and idioms.

In the cases of *Winters v. New York*, 333 U.S. 507, and *Cramp v. Board of Public Instruction*, 368 U.S. 278, this Court recognizes that authoritative interpretations of legislation by the Courts "puts . . . words into the statute as defintely as if it had been amended by the legislature."

While the Court of Appeals has authorized only the insertion of one word, as translated from the foreign text, the inarticulated premise is that the entire Code is subject to these interpolations under the guise of omissions and errors in translation. Petitioners suggest that this premise deprives them of constitutionally protected rights in light of the decision in *Langetta v. New Jersey*, 306 U.S. 451, where this Court held that statutory law which requires that "men of common intelligence must necessarily guess at its meaning," is legislation that is unconstitutionally vague. Accord: *Gorin v. United States*, 312 U.S. 19.

(2)

A DECISION OF THE LOUISIANA INTERMEDIATE COURTS HAS BEEN BRUSHED ASIDE

In *Bradley v. Yancey*, 195 So. 110 (La. App.) a Louisiana intermediate Appellate Court was confronted with the precise question involved in the instant suit. That Court refused to insert into Louisiana Civil Article 2716 word "doors" as the English translation of the French

word "portes." The Court held that resort to the French text was improper. The Court of Appeals for the Fifth Circuit characterized *Bradley v. Yancey*, supra, as "a single, aberrent deviation. . ." (App. A. pp. 24, 25) and refused to follow this square holding.

This cavalier treatment of a case conceded to be "on all fours" (App. A. p. 16) with the instant case, violates directives of this Court, cogently expressed in *Erie v. Tompkins*, 304 U.S. 64; *West v. American Telephone and Telegraph Co.*, 311 U.S. 223, and *Fidelity Union Trust Co. v. Field*, 311 U.S. 169.

The motivating force for the Court's refusal to follow the *Bradley* case, supra, apparently was the mere granting of a writ of certiorari by the Louisiana Supreme Court. It should be pointed out that in the *Bradley* case, supra, writs issued under La. Constitution Art. 7, Sec. 11 (App. B. p. 29) as a matter of right. Petitioners suggest and intend to argue, if this petition is granted, that the issuance of a writ of certiorari is not persuasive authority that the highest Court of the State would decide otherwise.

The Louisiana jurisprudence, referred to by the Court below, sanctions references to the French text of 1825 to resolve ambiguities and semantic discrepancies in construing the Civil Code of 1870. See *Phelps v. Rainach*, 38 La. Ann. 547 (La. S. Ct. 1886); *Sample v. Whitaker*, 172 La. 722, 135 So. 38 (La. S. Ct. 1931). However, petitioners are unaware of any Louisiana case which inserts words omitted from the Civil Code of 1870 by reason of errors in translation or otherwise.

A DECISION OF THIS COURT HAS BEEN EXPRESSLY OVERRULED

In the case of *Viterbo v. Friedlander*, 120 U.S. 707, this Court held that in the event of irreconciliable conflict between the English text of the Civil Code of 1870 and the French text of the Civil Code of 1825, "the English must prevail." The Court of Appeals for the Fifth Circuit dismissed the *Viterbo* case, supra, as "simply wrong." (App. A. p. 19).

Petitioners suggest that the determination below, per se, violates their rights as set forth in the United States Constitution, the 14th amendment and Article 1, Section 2 of the Louisiana Constitution. (App. B. p. 30).

CONCLUSION

For the foregoing reasons, petitioners pray that a writ of certiorari issue to the United States Court of Appeals for the Fifth Circuit in order to rectify a decision which violates the United States Constitution and ignores controlling state legislation and jurisprudence, and after due proceedings had, the judgment of the Court may be reviewed and reversed, to the end that petitioners' claim for damages shall be reinstated and remanded to the District Court for trial on its merits.

Respectfully submitted,
RAYMOND H. KIERR
Attorney for Petitioners

OF COUNSEL:
Kierr and Gainsburgh
Harvey J. Lewis

CERTIFICATE OF SERVICE

I, Raymond H. Kierr, a member of the Bar of the Supreme Court of the United States, do hereby certify that I have this day served upon the respondent herein a copy of the attached application for certiorari with its appendices, by depositing the same in the United States mails, postage prepaid at New Orleans, Louisiana addressd to Gerard M. Dillion, Esq., 412 American Bank Building, New Orleans, Louisiana, this ..... day of September, 1964.

.....

RAYMOND H. KIERR

APPENDIX "A"

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 20805

MARY H. SHELP and GENEVIEVE M. McKINNEY,
Appellants,

versus

NATIONAL SURETY CORPORATION,
Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana.

(June 26, 1964.)

Before TUTTLE, Chief Judge, RIVES and WISDOM, Circuit Judges.

WISDOM, Circuit Judge: The question this diversity tort action presents is whether, under Louisiana law, the lessor or the lessee is responsible for repairs to the doors of leased premises. The case turns on the variance between the French and English text of Article 2686 of the

Code of 1825. That article was the predecessor to Article 2716 of the Louisiana Revised Civil Code of 1870 which was published only in English. The district court held that the 1825 French text of Article 2686, binding the lessee for repairs of doors, prevails over the 1870 text of Article 2716. 218 F. Supp. 615. We affirm.

I.

One of the two plaintiffs leased an apartment in the French Quarter in New Orleans; the other was her house-guest. The complaint alleges that an intruder gained access to the apartment through the failure of the front door to close properly, assaulted both ladies, and raped one of them. The plaintiffs sued the lessor's insurer under the Louisiana Direct Action Statute, La. R.S. 22:655, alleging that the lessor was at fault "in failing to furnish a safe entrance door". The plaintiffs base their action on Article 2322 of the Civil Code:

> "The owner of a building is answerable for the damage occasioned by its ruin, when this is caused by neglect to repair it, or when it is the result of a vice in its original construction."

The parties agree that the lessor would be liable to the lessee and to third persons lawfully on the leased premises only if he were responsible for repair of the door.

The district court granted the defendant's motion for a summary judgment on the ground that Article 2716 of the Civil Code relieves the lessor of liability for defects in the premises which the lessee is obliged to keep in repair.

The first and last pargraphs of Article 2716 read:

> "The repairs which must be made at the expense of the tenant, are those which during the lease it becomes necessary to make:
>
> * * *
>
> To windows, shutters, partitions, shop windows, locks and hinges, and everything of that kind, according to the custom of the place."

Article 2716 is an exact copy of the English text of Article 2686 of the Code of 1825.[1] It contains no reference to doors. But the French version of Article 2686 includes repairs to "portes" (doors) among the repairs the lessee must make.[2] The last paragraph of the French text reads:

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[1]Except for several small differences in punctuation. The complete English text of Article 2716 is: "Art. 2716. The repairs, which must be made at the expense of the tenant, are those which, during the lease, it becomes necessary to make:

To the hearth, to the back of chimneys and chimney casing.

To the plastering of the lower part of interior walls.

To the pavement of rooms, when it is but partially broken, but not when it is in a state of decay.

For replacing window glass, when broken accidentally, but not when broken either in whole or in their greatest part by a hail storm or by any other inevitable accident.

To windows, shutters, partitions, shop windows, locks and hinges, and everything of that kind, according to the custom of the place."

[2]The complete French text of Article 2686 is: "Les réparations locatives sont celles qui deviennent necessares pendant la durée du bail;

Aux âtres, contre-coeurs, chambranles et tablettes de cheminés;

Au recrépiment du bas des murailles des appartemens;

Aux pavés et carreaux des chambres, lorsqu'il y en a seulement quelques-uns de cassés, et que tout le pavé, en general, n'est pas devenu mauvais par vétusté;

Aux vitres, excepté qu'elles ne soient cassées en totalité, ou en leur plus grande partie, par la grêle, ou autres accidens de force majeure;

Aux portes, croisées, planches de cloison et de fermeture de boutique, gonds, tarjettes, [targettes] serrures et autres, suivant l'usage des lieux."

> "*Aux portes*, crossées, planches de cloison et de fermeture de boutique, gonds, tarjettas, (targettes) serrures et autres, suivant l'usage des lieux."

Correctly translated, this paragraph reads:

> "*To doors*, casement windows, wooden partitions and shop shutters, hinges, bolts, locks and other things, according to the custom of the place."[3]

The French text of Article 2686 of the 1825 Code is identical with the French text of Article 20, Title VIII, p. 278, of the Code.[4] The English text of Article 30 follows the French version in that the lessee "is bound to keep in repairs the doors, etc."[5] This article is derived from

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[3]Louisiana Law Institute, Compiled Edition of the Civil Codes of Louisiana, 3 Louisiana Legal Archives (1942).

[4]The 1808 code is entitled, "A Digest of the Civil Laws Now in Force in the Territory of Orleans with Additions and Amendments Adapted to its Present System of Government."

[5]The French text reads: "Art. 30. Les Réparations locatives, sont celles qui deviennent necessaires pendant la durée du bail;
Aux âtres, contre-coeurs, chambranles et tablettes de cheminées;
Au recrépiment du bas des murailles des appartemens;
Aux pavés et carreaux des chambres, lorsqu'il y en a seulement quelques-uns de cassés, et que tout le pavé, en général, n'est pas devenue mauvais par vétusté;
Aux vitres, excepté qu'elles ne soient cassées en totalité ou en leur plus grande partie par la grêle ou autres accidens de force majeure;
Aux portes, croisées; planches de cloison et de fermeture boutiques, gonds, targettes et serrures, et autres suivant l'usage des lieux."
The English text reads: "Art. 30. The repairs which must be made at the expense of the tenant are those of hearth, back of chimneys, chimney ornaments and interior walls, a tenant must also cause any broken tile used in the paving of rooms to be replaced, but he shall not be obliged to repair said pavement, if it is entirely broken or worn out; a tenant must replace at his own expense any window glass accidently broken, but he cannot be compelled to replace them, if they have been broken either in whole or in their greatest part by a hail storm or by any other accident which cannot be foreseen. He is also bound to keep in repair the doors, window shutters, the partitions, the shop windows, the locks and every thing of that kind as is regulated by customs."

Article 1754 of the Code Napoleon (1804)[6] or, possibly, from the corresponding article of an earlier draft of that code,[7] the Projet du Gouvernement (1800).[8] Both the Code Napoleon and the Projet du Gouvernement require the lessee to repair doors of leased premises.

The plaintiffs point out the legislature promulgated the present code, the Revised Civil Code of 1870, only in English. They argue that there is no ambiguity in Article 2716 and that in construing the Code, as in construing any legislative act. a court is bound by the the plain wording of the law: where there is no ambiguity in the language of an article courts cannot change it meaning by resorting to the French text of the Code of 1825.[9]

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[6]"Les réparations locatives ou de menu entretien dont le locataire est tenu, s'il n'y a clause contraire, sont celles désignées comme telles par l'usage des lieux, et, entre autres, les réparations à faire, . . . Aux portes, croisées, planches de cloison ou de fermeture de boutiques, gonds, targettes et serrures."

[7]Martin, Cross, H. P. Dart, Franklin, and others have asserted that Moreau-Lislet and Brown based their work on a projet of the French Civil Code, principally because the numbering system of the Code of 1808 corresponds with that of the Projet du Gouvernement (1800) and because the Louisiana Code contains articles similar to those in the projet but omitted in the Code Napoleon. Martin, History of Louisiana 344 (1882); Cross, Successions XXIV (1891); Dart, The Sources of the Civil Code of Louisiana, Intro. to Saunders Lectures (1925), 13 La. Bar Ass'n Proc. 21, 70 (1911). Franklin, Some Observation on the Influence of French Law on the Early Civil Codes of Louisiana, in Le Droit Civil Français (Montreal 1936) 834. W. K. Dart has stated that the commissioners followed the last projet. Dart, The Louisiana Judicial System, 1 La. Dig. Ann. 20 (1917). Tucker believes that the 1804 Code was taken largely from the Code Napoleon. Tucker, The Code and Common Law in Louisiana, 29 Tul. L. Rev. 739, 745 (1955). See also Davidson, Stare Decisis in Louisiana, 7 Tul. L. Rev. 100 (1932).

[8]"Les réparations sont celles qui deviennent décessaires pendant la durée du bail, . . . Aux portes, croisées, planches de cloison ou de fermeture des boutiques, gonds, targettes et serrures, lorsqu'il en manque, ou qu'elles ont été détachées par violence, ou cassées et endommagées autrement que par vétusté, ou par leur mauvaise qualité;

Et autres désignées par l'usage des lieux."

[9]Article 13 of the Louisiana Civil Code provides: "When a law is clear and free from ambiguity, the letter of it is not to be disregarded, under the pretext of pursuing its spirit."

They rely on an all-fours case, *Bradley v. Yancy*, 1939, 2 Ct. App. La., 195 So. 110.

II.

It is at least arguable that the catch-all phrase "everything of that kind, according to the custom of the place" creates an ambiguity. Repairs to a door are in the nature of repairs to windows, shutters, and partitions.[10] Thus, the lessee has been held liable for the repair of doorknobs. Moreover, as a practical matter, it seems reasonable to have the same party liable for all the repairs to a door. Since the lessee must repair the locks and hinges of doors,[11] it is hard to believe that the legislature deliberately intended to release the lessee from liability to repair doors.

More important, in Louisiana, as in all civilian jurisdictions, the Civil Code is more than an ordinary legis-

[10]In Lowe v. Home Owners' Loan Corp., 1941, Ct. App., 1 So. 2d 362, affirmed 199 La. 676, 6 So. 2d 726, a third person rightfully on leased premises was injured when, in leaving the house, she pulled hard on a door knob in an effort to jam the door against the frame; the knob pulled loose precipitating the plaintiff across a porch and onto the sidewalk. For some time the lock had failed to catch when the door was closed, making it necessary that great force be exerted on the knob. The Court of Appeal said: "Even if a knob be not considered as a part of the lock, and, therefore, not within the express language of article 2716, still it would be included in the rather broad phrase 'and everything of that kind according to the custom of the place.'" 1 So. 2d at 368. The Supreme Court of Louisiana, in affirming the Court of Appeal, stated the rationale for Article 2716: "Because of his loss of possession and because during the existence of the lease the mere use of the property brings about the need for a number of minor repairs, the law as expressed in Article 2716 reduces the burden of responsibility imposed on the owner by placing some of the responsibility on the tenant. Window frames, window glasses, shutters, locks and hinges are parts of the leased premises that are subject to constant use. Because of that use, Article 2716 makes it the duty of the tenant who is in possession and not the landlord who is out of possession to make the minor repairs enumerated in the Article when, during the existence of the lease, the occasion arises therefor."

[11]Moore v. Aughey, 1918, 142 La. 1042, 78 So. 110; Lowe v. Home Owners' Loan Corp., supra, note 10.

lative act. The Code, doctrinally, constitutes the whole body of private law. A statute, on the other hand, is small in scope, narrow in its objective and, unless it is a petit code, such as the Louisiana Trust Code, is intended to deal with a specific mischief or a specific need. The relation between a code and a statute in the field of private law may be analogized to the relation between the commoon law and a statute in derogation of the common law.[12] Geny and other outstanding civilians have written learnedly on the subject.[13] We quote a less renouned authority but a

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[12]*cf.* (1) California Civil Code, Section 4: "The rule of the common law, that statutes in derogation thereof are to be strictly construed, has no application to this Code. The Code establishes the law of the state respecting the subjects to which it relates, and its provisions are to be liberally construed with a view to effect its objects and to promote justice." (2) The Swiss Code, Article 1: "The Code governs all questions of law which come within the letter or the spirit of any of its provisions." (3) French Civil Code, Article 4: "A judge who refuses to decide a case on the pretext that the law is silent, obscure or insufficient, may be prosecuted as being guilty of a denial of justice." Article 21 of the Louisiana Civil Code, which is based on the Projet, reads: "In all civil law matters, where there is no express law, the judge is bound to proceed and decide according to equity. To decide equitably, an appeal is to be made to natural law and reason, or received usages where positive law is silent."

The intentional omission of "doors" in Article 2716 would require the court to determine whether the lessee should be liable, reasoning by analogy, aided by usage. It would not mean, automatically, that the lessor is the party bound to repair doors. See Franklin, The Historic Function of the American Law Institute: Restatement as Transitional to Codification, 47 Harv. L. Rev. 1367, 1377-9 (1934); Sereni, The Code and the Case Law, in The Code Napoleon and the Common-Law World (Ed. by Schwartz 1956) 54, 57-63.

[13]The classic account is Geny's "Méthode D'Interprétation et Sources en Droit Privé Positif," recently translated by the Louisiana Law Institute (1936). Franklin describes it, in brief, as follows: "And the habitual way of interpretation is worth describing. The problem may be controlled by a code article. Controversy then will center about the interpretation of this article. For this there is an elaborate apparatus, the classic account of which is given by Geny, and by Savigny in the entire first volume of his *System*. The logical interdependence of the various texts, ethical notions, systematic considerations, contextual influences, historical factors, consequential effects, and the like, receive consideration. The important thing is the elaborate effort to ascertain the genuine significance of the text. In this there is no mere reliance upon the holdings of prior decisions. Indeed, the *code civil* expressly forbids decisions to be made so as to form a general rule of law, and

highly respected Louisiana scholar, George Dreyfous, because his comment was provoked by the *Bradley v. Yancy* misconstruction of Article 2716:

> "If the Code were to be construed as an ordinary statute, the Act of 1828 [repealing all civil laws in effect before the promulgation of the Code of 1825] would have created anarchy, since it is manifestly impossible to digest all of the laws of a complex society in a single volume less than one-half of the size of the Acts of 1840. The very nature of a code requires that analogies be drawn from its express provisions in deciding cases for which no exact rule can be found in the code and that when an article abstracts the pre-existing law the earlier jurisprudence be considered in cases not covered by the abstract."[14]

To parallel Marshall's famous maxim, we must never forget that it is a Code we are expounding.

True, Article 6, Section 15, of the Louisiana Constitution of 1812 provided that all laws enacted by the legislature must be written and promulgated in the language in which the United States Constitution was written. In accordance with that requirement, the Louisiana legislature, from 1808 to 1867, enacted its statutes in English.

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anyone who examines Dallox and Sirey will not find reference to authoritative materials other than the code texts. There is no *stare decisis* of interpretation. Furthermore, the interpretative process is not confined to the judges alone. The chief reliance is rather upon the theoretician as he has indicated his opinions in doctrinal writing. Interpretation of statutory texts is not the esoteric job of judges. It is an intellectual process in which law teachers have played a greater part than judges." Franklin, The Historic Function of the American Law Institute: Restatement as Transitional to Codification, 47 Harv. L. Rev. 1367, 1377 (1934).

[14]Dreyfous, Partial Defacement of Olographic Wills, 15 Tul. L. Rev. 272 (1941).

A *clerk* then translated the statutes into French for publication. The constitutional provision and the legislative practice very properly gave rise to the rule that the English text of Louisiana statutes controls.[15] *State v. Ellis*, 1857, 12 La. Ann. 390, 392; *State v. Mix*, 1844, 8 Rob., La. 549; *Williams v. Robinson*, 1850, 5 La. Ann. 110; *Parish of Lafourche v. Parish of Terrebonne*, 1882, 34 La. Ann. 1230. There can be no objection to this canon. The French text of a Louisiana statute represented not the legislature's enactment of the original text but a hired clerk's translation. This was not the case with the Codes. *Viterbo v. Fiedlander*, 1887, 120 U. S. 707, 7 S. Ct. 962, 30 L. Ed. 776, on which the plaintiffs rely, is simply wrong. Failure of counsel to present the historical background led the United States Supreme Court into mistakenly applying a rule of statutory construction that was inapplicable to the Civil Code.

III.

The Code of 1808 set the pattern for the Code of 1825. At the time, all Louisiana laws were published, in the newspapers and in book-form, in French and English.[16] The statute directing Louis Moreau-Lislet and James Brown to codify the law did not specify the language to

[15]"We know that the practice of the legislative department under this provision [the article of the Constitution requiring that acts be passed in English] has been to introduce and carry through the various stages of legislation bills in the English language alone. *They are translated into French for enrollment by a clerk*, but the statutes are adopted in the English only. They are not even required by the Constitution to be translated before receiving the Governor's signature. *The English text, therefore, of our ordinary statutes is emphatically the law.* The French version is not the work of the two Houses and the Governor, *but is a mere clerical labor*, its correctness dependent upon the skill and accuracy of *the clerk employed.*" (Emphasis supplied.) State v. Ellis, 1857, 12 La. Ann. 390, 392.

[16]Territorial Acts of 1805, Chap. XVIII, p. 90.

be used,[17] but since the legislature authorized a translation[18] into English, the legislature understood that the *projet* was prepared in French. The act which adopted the Code of 1808 required that it be printed in both French and English[19] and the legislature directed that in case of "any obscurity or ambiguity, fault or omission, both the English and French texts shall be consulted, and shall mutually serve to the interpretation of one and the other."[20]

Any doubt as to whether the Code of 1808 was originally drafted in French was dispelled by Moreau-Lislet himself. In *Dufour v. Camfranc*, 1822, 11 Mart. (O.S.) 688, 701, Moreau-Lislet called attention to a discrepancy between the English and French texts of Article 7. The report of the decision quotes him as saying:

> "We have nothing to do with the imperfections of the translations of the Code. The French text, in which it is known that work was drawn up, leaves no doubt."

In 1822 the Louisiana legislature appointed Moreau-Lislet, Edward Livingston and Pierre Derbigny to revise the Code by amending it "in such manner as they will deem advisable" and by adding to it "such of the laws as are still in force and not included therein."[21] As appears from the *projet*, all articles of the 1808 Code not amended

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[17]Territorial Acts of 1806, p. 218.

[18]See Territorial Acts of 1807, Chap. XXXI, p. 190-2.

[19]Territorial Acts of 1808, Chap. XXIX, p. 120.

[20]Ibid, § 5, 128. At first, the Louisiana Supreme Court attempted to comply with this mandate by applying the more comprehensive text, Chretien v. Theard, 1824, 2 Mart. (N.S.) 582, and by holding that compliance with either text was sufficient, Touro v. Cushing, 1823, 1 Mart. (N.S.) 425.

[21]La. Acts of 1823, p. 88, pursuant to resolutions adopted March 14, 1822.

or deleted were transferred to the new code in their original French.[22] Among these was Article 30, Title VIII, p. 278, the progenitor of Article 2716 of the 1870 Code. The redactors, therefore, had no intention of changing the sense of the article.

Unfortunately, the English translation of the French text of the Civil Code of 1825 and, for that matter, the Code of Practice of 1825, was spectacularly bad. The Supreme Court of Louisiana has said:

> "The definition relied on from the English side of one of the Articles of the Code proves nothing but the ignorance of the person who translated it from the French."[23]

Edward Dubuisson, Sr., in his study of the errors in translations in the Codes of Louisiana, has written:

> "The conclusion is, therefore, inevitable that the originals of the Code of Practice and of the Civil Code of 1825, as well as the original of the Code of 1808, were written in French. This is very unfortunate for Louisiana jurisprudence because even where the translations do not contain misleading errors, the vigor, the spirit, the clarity and finish of the originals are lost in the translations. Take, for instance, Article 578 of the Code of Practice relative to devolutive appeals.

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[22]The projet included only the "Additions and Amendments to the Civil Code." See Title, Republication of the Projet of the Civil Code of Louisiana of 1825, Louisiana Legal Archives, Vol. 1. "The amendments . . . to the old Code were submitted to the Legislature and with some slight alterations adopted.' But the remaining provisions in it [the old Code] did not pass a second time under the view of the legislature, nor were they reenacted." Fowler v. Griffith, 1827, 6 Mart. (N.S.) 89.

[23]Edgerton v. The Third Municipality of New Orleans, 1846, 1 La. Ann. 435, 437.

> The French text is not only full and complete but as clear and limpid as purest crystal, while the English text is abbreviated and deficient in clearness. . . .
>
> "The errors, omissions and ambiguities of the translations are so numerous that an extended review of them would take us entirely beyond the limits of this paper."[24]

The Code of 1825 contained a repealing clause (Article 3521). Uncertainty as to its effect, however, because of a Supreme Court decision,[25] led the legislature to adopt Act 40 of 1828, definitively repealing the Code of 1808. Making doubly certain, Act 80 of 1828 expressly abrogated the civil law in effect before promulgation of the Code of 1825.[26] Unlike the earlier code, the *Revised Civil Code of 1870 contains no repealing clause. As the title of the enacting statute states, that Code was only "to amend and reenact" the Code of 1825.* The purpose of the 1870 revision was not to codify in the sense that the Code Napoleon is a codification or to recodify in the sense that the Louisiana Code of 1825 is a recodification. "Codification, in the civil law sense of the word, always implies a new start, regardless of whether the former rules are com-

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[24]Dubuisson, The Codes of Louisiana (Originals Written in French; Errors of Translation), 25 La. Bar Ass'n Proc. 143, 149 (1924).

[25]The Court held that the omission in the 1825 Code of articles in 1808 Code did not constitute a repeal of the earlier articles. Fowler v. Griffith, 1827, 6 Mart. (N.S.) 39. cf. Reynolds v. Swain, 1839, 13 La. 193; Hubugh v. New Orleans & Carrollton R.R. Co., 1851, 6 La. Ann. 495; Morlin v. Monteleone, 1928, 165 La. 169, 115 So. 447.

[26]Act 40 of 1828 expressly repealed all articles contained in the Code of 1808, and all articles not reprinted in the new code, "except so much of title tenth as is embraced in its third chapter, which treats 'of the dissolution of communities and corporations'." See Durnford v. Clark's Estate, 1831, 3 La. 199, as to the effect of these acts on articles in the 1825 Code which were reenactments of articles in the 1808 Code.

pletely changed or merely remodeled."[27] The limited purpose of the 1870 revision was to delete the articles relating to slavery and to integrate the codal amendments since 1825. Adoption of the 1870 Code therefore did not, either in itself or in terms, indicate any intention to change the unamended articles of the Code of 1825.

Before the Civil Code of 1870 was adopted, the Supreme Court of Louisiana consistently held that the French text prevailed. *Durnford v. Clark's Estate*, 1831, 3 La. 199; *Walls v. Smith*, 1832, 3 La. 498, *seriatim* opinion of Judge Porter, followed in *Fowler v. Phillips*, 1925, 159 La. 668, 106 So. 26; *Davis v. Houren*, 1843, 6 Rob. 255; *Buard v. Lemée*, 1845, 12 Rob. 243; *Egerton v. Third Municipality of New Orleans*, 1846, 1 La. Ann. 435; *Beaulieu v. Ternoir*, 1850, 5 La. Ann. 476. And after the Code was adopted, Louisiana courts consistently applied this canon. *Phelps v. Reinach*, 1886, 38 La. Ann. 547; *Jurgens v. Ittman*, 1895, 47 La. Ann. 373, 16 So. 952; *Commercial Germainia Trust Service & Savings Bank v. White*, 1919, 145 La. 54, 81 So. 753; *Straus v. New Orleans*, 1928, 166 La. 1035, 118 So. 125; *Sample v. Whitaker*, 1931, 172 La. 722, 135 So. 38; *Crawford v. Alatex Construction Service, Inc.*, 1959, La. App., 120 So. 2d 845. Dubuisson has pointed out that *Phelps v. Reinach* "was decided in 1886 long after the adoption of the Code of 1870."[28] John H. Tucker, Jr.,

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[27]Brierly, The Codification of International Law, 47 Mich. L. Rev. 2, 3 (1948). Except for deletion of the slavery articles "the Code of 1870 is substantially the same as the Code of 1825, and hence the Code of 1870 really represented an 'amendment' rather than a 'revision' in the ordinary sense." Morrison, The Need for a Revision of the Louisiana Civil Code, 11 Tul. L. Rev. 213, 228 (1937). See also Florence Revision of the Laws of Louisiana, 5 La. Bar Ass'n Proc. 27, 28 (1904).

[28]Dubuisson, supra, note 22 at p. 148.

using the language of *Phelps v. Reinach*, states categorically, "*Today* the French text prevails where there is a conflict between the two texts."[29] (Emphasis supplied.) See Notes, 3 La. L. Rev. 452 (1941), 15 Tul. L. Rev. (1940), and 15 Tul. L. Rev. 272 (1941), all highly critical of *Bradley v. Yancy*. For additional comment see Hood, The History and Development of the Louisiana Civil Code, 33 Tul. L. Rev. 7, 16 (1958); Tucker, The Code and the Common Law in Louisiana, 29 Tul. L. Rev. 739, 746 (1955); Note, 19 La. L. Rev. 18 (1958); and Note, 33 Tul. L. Rev. 16 (1958). This Court has accepted the French Text of the 1825 Code as controlling. *Morton Trust Co. v. American Salt Co.*, Cir. Ct. E.D. 1906, 149 Fed. 540; *United States v. Harang*, 5 Cir. 1947, 165 F. 2d 106, *cert. den'd* 1948, 334 U. S. 811, 68 S. Ct. 1017, 92 L. Ed. 1743; *Commissioner v. Gray*, 5 Cir. 1947, 159 F. 2d 834. See especially Judge Lee's clear and compelling exposition in *Harang* in which this Court held that the word "profits" as used in Article 2402, defining community property, is an erroneous translation of the 1825 French text and must be read to mean "fruits".

Clutching *Erie*, the plaintiffs insist that *Bradley v. Yancy* compels this Court to reverse the judgment below. *Bradley v. Yancy* is the only decision squarely in point. In that case the court, refusing to read the word "doors" into Article 2716, did indeed hold the lessor liable under Article 2322 for injuries caused by a defective door.[30] *Bradley*

[29]Tucker, Source Books of Louisiana Law, 6 Tul. L. Rev. 280, 291 (1932).

[30]The Court of Appeal admitted that if it followed the decisions of the Louisiana Supreme Court it "would be compelled to insert and add the word 'doors' to the last paragraph of Article 2716." It argued that Article 13 of the Code relieved it of that necessity. (See note 9) The Code is "no different from any other legislative act . . . and there

v. Yancy is a single, aberrant deviation from the principle established in *Phelps v. Reinach*, *Straus v. New Orleans*, and *Sample v. Whitaker*, and other cases. The Supreme Court of Louisiana granted a writ in *Bradley v. Yancy*, but the proceedings were dismissed by agreement of the parties. *Erie* does not command blind allegiance to a case on all fours with the case before the court. There is no *Erie* obligation when there is "persuasive data that the highest court of the State would decide otherwise" than the intermediate appellate State court. *West v. American Telephone & Telegraph Co.*, 1940, 311 U. S. 223, 237, 61 S. Ct. 179, 85 L. Ed. 139. Here the *Erie* obligation is to the Code, the "solemn expression of legislative will." Article 1.

IV.

The Louisiana legislature was well aware that its great jurisconsults prepared the 1808 Code and 1825 Code in French and based the Codes on French and Spanish sources. Livingston has pointed out that the codification in part was motivated by anti-English and anti-common-law feeling in Louisiana.[31] The primacy of the civil law, carrying with it many civilian concepts and terms for which there are no accurate English equivalents,[32] makes

is no justification in law for adding to or taking from any article of the act (Revised Civil Code)." 195 So. at 113.

[31]Complete Works of Edward Livingston on Criminal Jurisprudence (1873), 87. "The Anglo-American common law was regarded as an immediate menace for it was ungraspable because of its language and its weak juridical method." Franklin, Concerning the Historic Importance of Edward Livingston, 11 Tul. L. Rev. 163, 211 (1937).

[32]Dreyfous, criticizing the *Bradley v. Yancy* rule, suggests: "A better rule is to prefer the French text when it is apparent that it is taken from an article of the French Code, as in such case, the English text is a translation of the French, and the redactors would not purposely have modified the French text by an error in translation." Comment, supra, note 12.

the primacy of the French text of 1825 logical and inevitable. This is one of the inarticulated premises on which the Code rests. The legislative intention is manifest when the particular codal article in question is derived from civilian sources and when there is no reason to think that the legislature intended the 1870 English version to change the legal content of the article. No inadvertent omission or error by some hack translator is entitled to precedence, no matter how plain the English, when it produces a result contrary to established civil law as stated in the Codes of 1808 and 1825.

We hold: Article 2716 of the Code of 1870 must yield to the French text of Article 2686 of the Code of 1825. The controlling fact is the derivation of the article from a civilian source, here the Code Napoleon with its antecedents in light of the historical background of the Louisiana Codes, the result we reach represents the Louisiana legislature's will.

The judgment is AFFIRMED.

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1963

No. 20805

D. C. Docket No. 12813

MARY H. SHELP and GENEVIEVE M. McKINNEY,
Appellants,

versus

NATIONAL SURETY CORPORATION,
Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before TUTTLE, Chief Judge, RIVES and WISDOM, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged by this Court that the appellants, Mary H. Shelp and Genevieve M. McKinney, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

June 26, 1964

Issued as Mandate: July 21, 1964

APPENDIX "B"

United States Constitution, Amendment XIV:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . ."

Louisiana Constitution of 1921:

Article 7, Section 11:

> "It shall be competent for the Supreme Court to require by writ of certiorari, or otherwise, any case to be certified from the Courts of Appeal to it for review, with the same power and authority in the case as if it had been carried directly by appeal to the said court; provided, that where the application is based solely upon the ground that the decision of the question of law involoved is in conflict with the jurisprudence of the Supreme Court or another Court of Appeal upon a question not yet decided by the Supreme Court, and it is found that such is the fact, then the application shall be granted as a matter of right; provided, however, that the Supreme Court shall in no case exercise the power conferred by this Article unless the application shall have been made to the court or to one of the justices thereof within thirty days after a rehearing shall have been refused by the Court of Appeal shall not become executory until the expiration of thirty days; or, in cases in which application is made for the writ or review, or other writs, unitl the decision of the Supreme Court upon the application shall have become final."

Article 1, Section 2:

"No person shall be deprived of life, liberty or property, except by due process of law. Except as otherwise provided in this Constitution, private property shall not be taken or damaged except for public purposes and after just and adequate compensation is paid."

Louisiana Civil Code (1870):

Article 2322:

"The owner of a building is answerable for the damage occasioned by its ruin, when this is caused by neglect to repair it, or when it is the result of a vice in its original construction."

Article 2716:

"The repairs, which must be made at the expense of the tenant, are those which, during the lease, it becomes necessary to make:

"To the hearth, to the back of chimneys and chimney casing.

"To the plastering of the lower part of interior walls.

"To the pavement of rooms, when it is but partially broken, but not when it is in a state of decay.

"For replacing window glass, when broken accidentally, but not when broken either in whole or in their greatest part by a hail storm or by any other inevitable accident.

"To windows, shutters, partitions, shop windows, locks and hinges, and everything of that kind, according to the custom of the place."

Article 7:

"After the promulgation, no one can allege ignorance of the law."

Louisiana Civil Code (1825):

Article 2686:

"Les reparations locatives sont celles qui deviennent necessaires pendant la durée du bail;

"Aux âtres, contre-coeurs, chambranles et tablettes de cheminés;

"Au recrépiment du bas des murailles des appartemens;

"Aux pavés et carreaux des chambres, lorsqu'il y en a seulement quelques-uns de cassés, et que tout le pavé, en general, n'est pas devenu mauvais par vétusté;

"Aux vitres, excepté qu'elles ne soient cassées en totalité, ou en leur plus grande parties, par la grêle, ou autres accidens de force majeure;

"Aux portes, croisées, planches de cloison et de fermeture de boutique, gonds, tarjettes, [targettes] serrures et autres, suivant l'usage des lieux."